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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B7

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 0 8 2010
WAC 09 179 50092

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds.

On appeal, counsel submitted a brief and resubmits previously submitted evidence. Counsel also requested an extension to submit additional evidence. Counsel dated the appeal December 14, 2009. As of this date, more than five months later, this office has received nothing further. The appeal, therefore, will be adjudicated based on the record before the director, some of which was resubmitted on appeal, and counsel's appellate brief. For the reasons discussed below, we uphold the director's bases of denial. Moreover, given that the commercial enterprise reopened in spring 2008, several months before the petitioner claims to have made his investment, the record lacks sufficient evidence of how the petitioner's claimed investment will create new jobs.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, [redacted] LLC, not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000.

INVESTMENT OF CAPITAL

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
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> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
>
> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
> >
> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
> >
> > (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
> >
> > (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or

nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner indicated on the Form I-526 that he had invested an initial $250,001 on December 12, 2008 and a total of $1,000,000. On part 4 of the petition, the petitioner indicated that the full investment involved assets purchased for use in the enterprise. As evidence of this claimed investment, the petitioner submitted a December 1, 2008 agreement for dilution of ownership interest whereby [redacted], [redacted] and [redacted] agreed to allow a dilution of their interest from one third each to one sixteenth each through acceptance of the petitioner's $1,000,000 investment into [redacted], LLC. The agreement provides that after the transaction, the petitioner's interest in the company would be 50 percent. The agreement further provides: "The payment to the company from [the petitioner] shall be used for capital improvements and to make certain repairs to its physical assets and for such other purposes as the company may require." An amendment to the operating agreement dated December 1, 2008, eliminates the provisions in the original operating agreement relating to capital contributions and capital accounts, substituting a straight ownership assignment irrespective of capital contribution.

The petitioner also submitted an Internet bank record for [redacted] reflecting a deposit of $250,001 on December 12, 2008 and a deposit of $749,999 on December 17, 2008. The reference numbers for these deposits are 410094677 and 350472558 respectively. The Internet bank record does not identify the source of these deposits. Moreover, the petitioner did not submit financial statements or a company tax return, including schedule L, reflecting that this infusion of cash represents an equity contribution.

In response to the director's request for additional evidence, the petitioner submitted a membership certificate for a 50 percent interest in [redacted] LLC dated December 5, 2008. As stated above, however, the amended operating agreement provides for this assignment of interest regardless of capital contribution and capital account.

The petitioner also submitted a Commerce Bank statement for [redacted] listing the above deposits on December 12 and December 17 of 2008. This statement also shows a transfer of $300,000 to [redacted] on December 16, 2008. A handwritten notation indicates that this was a bank loan payment. Finally, the statement reflects three checks, cashed December 29, 2008, for $116,666.67 each. The copies of these checks provided indicate that they were issued to the other three members of [redacted]

The petitioner also submitted a December 2008 Commerce Bank statement for the petitioner. This statement shows checks for $250,001 and $749,999 on December 12 and December 17 of 2008. The

reference numbers for these checks, however, are 410094678 and 350472559 respectively. As noted by the director, these reference numbers do not match the reference numbers for the deposits in the account of [redacted] on those dates.

In addition, the petitioner's response to the director's request for evidence included the Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Return for an S Corporation filed by [redacted] for 2008 as well as 2008 financial statements for the company. The financial statements are not preceded by the accountant's statement indicating whether the statements are compiled, reviewed or audited. Rather, they appear to be self-serving internally generated statements. The schedule L attached to the Form 1120S indicates no capital stock or additional paid-in-capital. Instead, the schedule reflects that while the mortgage decreased from $1,000,000 to $643,983, shareholder loans increased from $125,000 to $232,000. The company's total assets amount to $805,095. The balance sheet as of December 31, 2008 also shows a shareholder loan for $232,000, a mortgage of $643,983 and no capital. While the petitioner submitted a profit and loss statement for December 2008 through July 2009, the petitioner did not submit a balance sheet as of July 31, 2009. In addition, the petitioner's schedule K-1 submitted with the company's tax return lists his interest in the [redacted] as only 4.23498 percent. The schedules K-1 for the remaining members list their interests between 31 and 33 percent.

Finally, the petitioner submitted a business plan containing the following language:

> **1.11 Payback/Exit Strategy**
> The amount and scheduling of payback installments or exit strategy options shall be as established and mutually agreed to by the investor and the management.

The director concluded that the petitioner had not traced the deposits in the company account back to his personal account and that the schedule L and balance sheet did not reflect an equity investment of $1,000,000.

On appeal, counsel does not address the discrepancy between the reference numbers for the deposits and checks and the petitioner did not submit a bank letter explaining the discrepancy or copies of the checks. Counsel also makes no attempt to explain why the 2008 schedule L and balance sheet do not reflect an equity investment. Instead, counsel lists the evidence that was previously submitted and concludes as follows (the paragraph below is reproduced in its entirety, including the incomplete sentence that ends the paragraph):

> The petitioner in his I-526 petition demonstrated that the full $1M was at risk. The evidence as [a] whole establishes that the enterprise is a growing successful business with substantial capital. The law, regulation, and precedent decision only require that the funds be committed at the time of filing, not that they be in use as intended at that time. Petitioner's [*sic*] had already purchased an existing business at the time of filing and the business itself was operational. The petitioner made substantial improvement to the enterprise and the $1M was at risk. In particular [*sic*]."

The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

First, the director did not question that the hotel was operational. At issue are whether the petitioner is the source of the funds deposited with [redacted], LLC and whether those funds represent an equity investment. Second, while the petitioner need only be actively in the process of investing, the funds must be fully committed as of the date of filing. In this case, the petitioner claims to have already made the necessary investment and has not suggested that he has additional funds that are committed to the business as a future investment. Thus, he must document his claimed investment. Third, the fact that the petitioner claims to have purchased an interest in an existing business does not exempt him from the requirement that he document his investment as an equity investment.

In light of the above, the petitioner has still not documented that the deposits with [redacted] Hospitality are the same funds represented by checks issued on the petitioner's personal account. In addition, the petitioner has not explained why the tax return, schedule L, and the balance sheet do not reflect any equity investment. In addition, as stated above, the business plan references a buyback plan and exit strategy, verbiage that strongly suggests a loan rather than an equity investment.

In addition to the director's concerns, it is significant that the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm'r. 1998). As stated above, shortly after the funds alleged to be from the petitioner were deposited, [redacted] LLC issued three checks for $116,666.67 each to the three other members. These funds appear to have been distributed in exchange for their diluted interest in the company. As these funds were not made available for job creation at [redacted] LLC, they cannot be considered part of a qualifying investment.

In light of the above, we concur with the director that the petitioner has not demonstrated a qualifying equity investment of personal funds.

SOURCE OF FUNDS

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm'r. 1998); *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1040 *aff'd* 345 F.3d at 683 (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner initially submitted transactional evidence without any explanation as to how it demonstrated the lawful source of the funds purportedly invested. In response to the director's request for evidence, counsel asserts for the first time that [redacted] gifted the funds to the petitioner. The petitioner submitted an affidavit from Mr. [redacted] affirming the gift and asserting that he transferred the funds from his account at Barclays Bank through his son in Florida.

Initially, the petitioner submitted evidence that [redacted] transferred GBP 450,000 to [redacted] account on January 24, 2008. The statement reflecting the receipt of these funds indicates that it is a statement for Quickcall Enterprises but the statement is addressed to [redacted] transferred GBP 100,000 to the same [redacted] account on February 13, 2008. The record does not establish any relationship between Mr. [redacted] and the petitioner or Mr. [redacted] then transferred GBP 550,000 to [redacted] on March 17, 2008. The record does not establish any relationship between Mr. [redacted] and the petitioner or Mr. [redacted]. On the date of this transfer, GBP 550,000 was equal to $1,110,420 according to the exchange rates available at www.oanda.com, accessed on June 4, 2010 and incorporated into the record of proceeding.

On August 12, 2008, [redacted] transferred $490,000 to [redacted] in Florida. The originator is identified as "[redacted]." On December 15, 2008, [redacted] transferred another $360,000 to [redacted]. The originator is identified as [redacted] On December 11, 2008, [redacted] transferred $250,000 to the petitioner and on December 16, 2008 [redacted] transferred another $750,000 to the petitioner.

It is clear from the above discussion of the transactional evidence that the petitioner has not traced the funds from Mr. [redacted] to [redacted]. Specifically, the path of funds from Mr. [redacted] ends with Mr. [redacted] and there is no transactional evidence tracing those funds to the [redacted] and [redacted] accounts from which someone transferred funds to [redacted]. As noted by the director, the petitioner did not provide any evidence documenting how Mr. [redacted] lawfully accumulated sufficient funds to gift $1,000,000 to the petitioner.

On appeal, counsel states:

> The service center erred in their statement that the "gift letter did not describe how the petitioner's uncle earned at least $1,000,000 to gift the application." The uncle has been a business man for a long time and he is well established in the United Kingdom. The money he obtained from his business was from lawful means and which grew in a span of 10-15 years. We are in the process of obtaining the financial records (*for the last 10 years*) of [redacted] who currently resides in [the] United Kingdom to show that the money in question was obtained through legal investments transaction and multiplied over the years. The financial records will be supplemented at a later time.

(Emphasis in original.)

The director did not err in concluding that the record before the director did not explain or document how Mr. [redacted] accumulated sufficient funds to gift $1,000,000 to the petitioner. The first such explanation is provided by counsel on appeal. As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. As stated initially, the petitioner has not supplemented the appeal with any new documentation.

In light of the above, the petitioner has not documented how Mr. [redacted] lawfully accumulated sufficient funds to gift $1,000,000 to the petitioner and the transactional evidence does not trace the funds [redacted] transferred to the petitioner in December 2008 back to Mr. [redacted] Thus, the petitioner has not documented the lawful source of the funds purportedly invested.

EMPLOYMENT CREATION

The regulation at 8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.
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> * * *
>
> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1039 *aff'd* 345 F.3d at 683 (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit U.S. Citizenship and Immigration Services (USCIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho,* 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

The petitioner indicated on the petition that he had invested in an existing business and left blank part 5, which requires the number of employees at the time of investment, the number of current employees and the number of new jobs projected. Initially, the petitioner submitted a one-page business plan estimating the need for two security personnel, five maids, two bartenders and one to two office attendants.

In response to the director's request for additional evidence, the petitioner submitted the Forms 941, Quarterly Federal Tax Returns filed by [redacted] for the third and fourth quarters in 2008 and the first and second quarters in 2009. These forms reflect that [redacted] employed 12 employees in the third quarter of 2008 and continued to employ that number until the second quarter of 2009, where it employed only nine employees. The record does not establish how many of these employees worked full-time. The petitioner also submitted 32 Forms W-2 Wage and Tax Statements for 2008 but these forms do not establish how many employees were working at one time, whether these employees worked full-time or when they began

working for [redacted]. Moreover, the Forms W-2 list a different Employer Identification Number (EIN) than the one listed on [redacted] 2008 tax return, the company's 2008 and 2009 Forms 941 and the August 25, 2009 IRS letter submitted. The petitioner did not submit Forms I-9 and attached documentation for its current employees to establish that any of these employees are qualifying as defined at 8 C.F.R. § 204.6(e).

The petitioner does not claim to have invested any funds until December 2008, at which time [redacted] already employed 12 workers and had done so for at least several months. The petitioner must establish that he will create at least 10 *new* jobs beyond the 12 in existence at the time of his investment. Thus, the petitioner must establish that [redacted] will require a total of at least 22 employees within the next two years.

The petitioner did submit a more detailed business plan in response to the director's request for additional evidence. The only two sections relating to employment are as follows:

> **1.8 Employment Opportunities for American Workers**
> It is currently estimated that we will be able to provide fifteen number of full-time employment opportunities available for American workers. The business expansion goals indicate requirements for between 18-20 part-time and full-time employees over the next two (2) year time horizon.
>
> * * *
>
> **2.5 Support Staff**
> At a later time, when necessary, additional employees will be hired as required, to fill any new positions that are essential. However, whenever possible, management will make maximum use of "shared manpower resources, part-time employees, and/or temporary employees" in order to limit staff growth and conserve labor costs.

The business plan does not adequately explain the business's staffing requirements and does not contain a timetable for hiring new employees and job descriptions for all positions as required for a comprehensive business plan. *See Matter of Ho,* 22 I&N Dec. at 213. Moreover, it is not apparent from these brief discussions of employment that [redacted] plans to create 10 *new* jobs above the 12 that existed at the time of the petitioner's investment. In light of the above, the petitioner has not established that any of the jobs created are for qualifying employees or that the petitioner's investment will create the requisite 10 new jobs. Rather, it appears that Jai Shri Ram Hospitality has actually lost three jobs since the petitioner made his investment. For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.